No. 14163

United States Court of Appeals

FOR THE NINTH CIRCUIT.

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [9][1]

[1] Numbers appearing in brackets herein refer to pages of the printed Transcript of Record, except when "F" precedes the numbers. In that event the numbers appearing within brackets refer to the draft board file, received in evidence and marked as Government's Exhibit 1. Papers in the draft board file are numbered by a written longhand figure which is encircled.

The district court made no specific findings of fact. The trial court found appellant guilty. [94] Title 18, Section 3231, United States Code confers jurisdiction in the United States District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure.

The notice of appeal was filed in the time and manner required by law. [11] The statement of points has been duly filed.

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified he was ordered to report for induction. It was then alleged that after reporting for induction he "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. He waived the right of trial by jury. [4] Findings of fact and conclusions of law were also waived. [4-5]

After receiving evidence and hearing testimony at the trial the court considered argument of counsel and reasons for judgment of acquittal. [15-23, 40-44] The court concluded that no reason existed why appellant should be acquitted. It stated the reason for concluding that appellant was guilty. [15-23, 40-44] It found appellant guilty. [94] Appellant was sentenced to serve a period of three years in the custody of the Attorney General. [9-10, 96] The transcript of the record (including the statement of points relied upon) has been timely filed in this Court.

THE FACTS

Bernard Henry Ashauer was born August 27, 1930. [F 1] He registered with his local board on September 17, 1948. [F 1] His classification questionnaire was mailed to him on September 16, 1949, and he returned it on September 22, 1949. [F 3-4] He showed his employment with General Motors plant at Van Nuys, California. [F 7] He completed six years elementary schooling, two years junior high schooling and four years high schooling and was graduated. [F 9] He signed Series XIV certifying that he was a conscientious objector. [F 10]

The local board mailed the special form for conscientious objector to him on December 28, 1950. [F 11, 14] He filed the form on January 7, 1951. [F 14] He signed series I(B) certifying that he was opposed to his participation in both combatant and noncombatant military service. [F 14] He stated that he believed in the Supreme Being and described the nature of his belief that imposed obligations higher than those owed to the state. [F 14] He received his religious training since childhood. [F 15] He relied on the Bible as his guide and said his teachers were Jehovah God and Christ Jesus. [F 15] He said he believed in the use of force for self-defense. [F 15]

He referred to his attendance at Bible meetings and distribution of Bible literature as the actions in his life demonstrating the depth of his religious convictions. [F 15] He had given public expression to his views as a conscientious objector. [F 15] He gave his general background, listing schools attended, employment and residences. [F 15-16] He stated his parents were Jehovah's Witnesses. [F 16] He stated he had never belonged to any military organization but was a member of a religious organization: Jehovah's Witnesses. He was reared as one of Jehovah's Witnesses. [F 16] He said the organization had no creed but having been consecrated to the service of God he was opposed to participation in war and must remain entirely neutral when nations of the world are involved. [F 16] He could

not fight for any nation against another. [F 16] Jehovah's Witnesses are neutral regardless of what nation they reside in. [F 16] He gave references and signed the certificate at the end of the form. [F 17]

He filed along with the special form for conscientious objector a two-page statement in which he gave his background and showed that he was enrolled in the Theocratic Ministry School. He quoted extensively Scriptural statements supporting his conscientious objector stand. He stated he must obey God rather than man. [F 18-19] He also filed at the time a booklet entitled "God and State" and the magazine, *The Watchtower,* for February 1, 1951. This magazine described in detail the views of Jehovah's Witnesses in respect to participation in war. [F 21]

The local board placed him in Class IV-E on January 16, 1951. [F 11] Ten months later, without any change in his status, he was taken out of the conscientious objector class and placed in Class I-A. [F 11] He appealed in writing and requested a personal appearance to discuss his claim for classification as a conscientious objector. In the letter he argued his case extensively. [F 11, 22-23]

He had a personal appearance on December 4, 1951. A memorandum was made by the board. [F 11, 25] He was again classified in I-A on December 4, 1951. [F 11] He appealed and filed numerous affidavits supporting his conscientious objector claim in every detail. [F 26-35] The appeal board reviewed the file and made a determination that required a reference of the case to the Department of Justice for appropriate inquiry and hearing. [F 11] The file was sent to the Depratment of Justice. [F 36]

There was a secert investigation conducted by the FBI. A hearing before a hearing officer of the Department of Justice was had. [F 39-40] Thereafter the Department of Justice at Washington wrote a letter of recommendation to the appeal board. This recommendation did not refer to any evidence that contradicted or impeached the sincerity of appellant's claim as a conscientious objector. The

Department's recommendation against the conscientious objector claim was solely because appellant believed in the use of force for self-defense and because the Department of Justice considered that the views expressed in the February 1, 1951, issue of *The Watchtower* concerning his belief in Theocratic warfare proved that he was not a conscientious objector. Mr. T. Oscar Smith, Special Assistant to the Attorney General, writing for the Department of Justice, recommended to the appeal board that the claim for exemption from combatant and noncombatant military service be denied. [F 39-40]

The appeal board accepted the recommendation, denied the conscientious objector claim and placed appellant in Class I-A. [F 41] This classification made him liable for unlimited military service. The appeal board returned the file to the local board and notice of classification was mailed to appellant on November 19, 1952. [F 11] Appellant was thereupon ordered to report for induction. [F 11, 42] Appellant reported for induction on December 8, 1952, but refused to submit to induction. [F 11, 46-49]

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed appellant possessed conscientious objections to participation in both combatant and noncombatant military service. His objections were based upon his sincere belief in the Supreme Being. His obligations to Jehovah God are superior to those owed to the state. They are above those flowing from any human relation. His beliefs are not the results of political, philosophical or sociological views. They are based solidly upon the Word of God. [F 12, 14-23, 26-35]

The local board classified him in Class I-A. [F 11] He appealed and there was a Department of Justice hearing. The Assistant Attorney General made a recommendation to the appeal board. He found appellant to be sincere in his beliefs as a conscientious objector. [F 39-40] He recom-

mended against classifying appellant as a conscientious objector. [F 39-40] The appeal board denied the conscientious objector status. [F 41]

Upon the oral argument it was urged that there was no basis in fact for the classification given by the local board.

The question presented here, therefore, is whether the denial for classification as a conscientious objector was arbitrary, capricious and without basis in fact.

II.

The file of appellant was referred to the Department of Justice pursuant to the Selective Service Regulations and Section 6(j) of the Universal Military Training and Service Act. There was a hearing held before a hearing officer. A report was made to the Department of Justice. [F 39-40]

The Assistant Attorney General made a recommendation to the appeal board based on the report of the hearing officer. [F 39-40]

The Assistant Attorney General held in his recommendation that the belief of appellant in the right of self-defense was enough to defeat his conscientious objector status. He recommended, that since appellant believed in theocratic warfare he was not a conscientious objector. The recommendation to the appeal board was that even though appellant was a sincere Jehovah's Witness he was not entitled to be classified as a conscientious objector. [F 39-40]

This point was specifically raised in the argument before the trial court. [20-21, 40-42]

The question presented, therefore, is whether the recommendation of the Department of Justice to the district appeal board was arbitrary, capricious and based upon artificial, irrelevant and immaterial grounds as to what constitutes a conscientious objector so as to destroy the appeal board classification.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to acquit the appellant as requested at the close of all the evidence.

II.

The district court erred in convicting appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim made by appellant for classification as a conscientious objector and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war, both combatant and noncombatant. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God higher than those to the state. The evidence showed that his beliefs were not the result of political, sociological or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that

the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses.

The local board accepted appellant's testimony. It is undisputed. Notwithstanding the undisputed evidence in his file, the local board and the district appeal board classified appellant I-A and held that the appellant was not entitled to the conscientious objector status.

The Supreme Court of the United States in *Dickinson* v. *United States* held that the "dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."—*Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152 (Nov. 30, 1953).

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*Jewell* v. *United States,* 6th Cir. Dec. 22, 1953, 208 F. 2d 770; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *United States* v. *Alvies,* N. D. Cal. S. D., May 28, 1953, 112 F. Supp. 618; *United States* v. *Graham,* W. D. Ky., 1952, 109 F. Supp. 377, 378; *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Weaver* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Lowe* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 823; *Pine* v. *United States,* 4th Cir., Apr. 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Hagaman,* 3d Cir., May 13, 1954, — F. 2d —; *United States* v. *Rodriguez,* D. P. R., Feb. 24, 1954, 119 F. Supp. 111; *United States* v. *Lowman,* W. D. N. Y., Jan. 15, 1954, 117 F. Supp. 595; *United States* v. *Benzing,* W. D. N. Y., Jan. 15, 1954, 117 F. Supp. 598; *United States* v. *Close,* 7th Cir., June 10, 1954, — 2d —.

POINT TWO

The recommendation to the appeal board by the Department of Justice is arbitrary and capricious and is based on artificial, irrelevant and immaterial elements as to what constitutes a conscientious objector.

The uncontradicted record shows that the report of the hearing officer and the recommendation of the Department of Justice to the appeal board were adverse to appellant. The sole and only reason for the recommended denial of the conscientious objector claim was that appellant believed in self-defense and theocratic warfare notwithstanding his opposition to the participation in war between the nations of this world. This recommendation for the denial of the conscientious objector claim was based on artificial, irrelevant and immaterial elements foreign to the statutory definition of conscientious objection. The recommendation of the Assistant Attorney General was, therefore, illegal. The appeal board accepted the recommendation and denied appellant his claim for classification as a conscientious objector. Reliance upon the recommendation that was defective destroyed the proceedings.

It is the settled opinion among the Courts of Appeals that have had an opportunity to write on the subject that belief in self-defense and theocratic warfare is no basis for denial of the conscientious objector claim.—*Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953; 208 F. 2d 329; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —.

A recommendation to the appeal board based on this artificial standard invalidates the proceedings.—See *Taffs* v. *United States, supra;* compare *Annett* v. *United States, supra.*

When the chain of proceedings in the Department of

Justice is so illegal that it cannot stand by itself, the entire administrative chain is broken. The illegality of the Department of Justice proceedings makes invalid the entire draft board proceedings.—See *United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128; *United States* v. *Romano* S. D. N. Y., 1952, 103 F. Supp. 597; *United States* v. *Bouziden,* W. D. Okla., 1952, 108 F. Supp. 395; see also *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689.

It is submitted that the recommendation by the Department of Justice to the appeal board is illegal, arbitrary, capricious and jaundiced, and destroyed the appeal board classification upon which the order to report for induction was based.

ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim made by appellant for classification as a conscientious objector and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service

because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participa-

> tion in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. § 456(j), 65 Stat. 83.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal moral code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board and the appeal board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

The undisputed documentary evidence in the file before the appeal board showed that the appellant was conscientiously opposed to participation in combatant and noncombatant military service. He showed: (1) he believed in the Supreme Being, (2) he was opposed to participation in combatant and noncombatant military service, (3) he based his belief and opposition to service on religious

training and belief as one of Jehovah's Witnesses, (4) such stand did not spring from political, sociological or philosophical beliefs. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

It has been held by many courts of appeals that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953) holding that if there is no contradiction of the documentary evidence showing exemption as a minister that there is no basis in fact for the classification also applies in cases involving claims for classification as conscientious objectors.—*Weaver* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —; *contra United States* v. *Simmons,* 7th Cir., June 15, 1954, — F. 2d —.

Recently in *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —, after quoting from *Dickinson* v. *United States,* 346 U. S. 389, the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeal.

In those cases the appellants, like appellant here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of the courts with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —. And these cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objection are concerned.

It is respectfully submitted that the motion for judgment

of acquittal should have been sustained because there is no basis in fact for the classification given by the draft boards and the denial of the conscientious objector classification was arbitrary and capricious. The judgment of the court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

POINT TWO

The recommendation to the appeal board by the Department of Justice is arbitrary and capricious and is based on artificial, irrelevant and immaterial elements as to what constitutes a conscientious objector.

The undisputed evidence shows that the recommendation of the Department of Justice to the appeal board was accepted by the appeal board. The appeal board acted upon it. The recommendation incorporated into it and made a part of it foreign and irrelevant and immaterial considerations as to what constitutes a conscientious objector. The recommendation of the Department was based on appellant's belief that theocratic warfare was proper. He was not, therefore, conscientiously opposed to participation in wars between the nations of this world as a combatant and noncombatant soldier. This type of recommendation has been condemned.—*Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 329; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366. Compare *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Jessen* v. *United States,* 10th Cir., May 7, 1954 —F. 2d—.

The recommendation of the Department of Justice was illegal. It became a chain in the administrative proceedings

when the appeal board classified appellant in the manner that the Assistant Attorney General recommended. The classification by the appeal board was an adoption of the recommendation by the Department of Justice. The illegal defect in the recommendation tainted the entire proceedings in the draft boards and made them illegal after the recommendation was filed with the appeal board.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact appellant to be a conscientious objector, was arbitrary and capricious because the basis for the rejection of appellant's evidence was on illegal and irrelevant grounds.—*Linan* v. *United States,* 9th Cir., 1953, 202 F. 2d 693.

The report of the hearing officer was adopted by the Department of Justice in its recommendation. The appeal board followed the recommendation of the Department of Justice. While the recommendation was only advisory, the fact is that it was accepted and acted upon by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer and the Department of Justice. It gave appellant a I-A classification and denied him the conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error. —See *United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128.

It is respectfully submitted that the recommendation by the Assistant Attorney General to the appeal board, which was accepted by the board, is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report for induction was based.

CONCLUSION

Wherefore appellant prays that the judgment of the court below be reversed and the cause remanded with directions to grant the motion for judgment of acquittal.

Respectfully,

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July, 1954.